Federal Court of Appeal

Cour d'appel fédérale

Date: 20091222

Docket: A-593-07

Citation: 2009 FCA 377

CORAM: **NOËL J.A.**
PELLETIER J.A.
TRUDEL J.A.

BETWEEN:

LINDA JEAN, CHIEF OF THE MICMAC NATION OF GESPEG, IN HER OWN NAME AND ON BEHALF OF ALL OTHER MEMBERS OF HER BAND, AND THE CONSEIL DE LA NATION MICMAC DE GESPEG

Appellants

and

MINISTER OF INDIAN AFFAIRS AND NORTHERN DEVELOPMENT

and

ATTORNEY GENERAL OF CANADA

Respondents

and

WOMEN'S LEGAL EDUCATION and ACTION FUND

Intervener

Heard at Montréal, Quebec, on October 19, 2009.

Judgment delivered at Ottawa, Ontario, on December 22, 2009.

REASONS FOR JUDGMENT BY: TRUDEL J.A.

CONCURRED IN BY: NOËL J.A.
PELLETIER J.A.

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REASONS FOR JUDGMENT

TRUDEL J.A.

Preamble

[1] This is an appeal from an order of Justice Martineau (the trial judge) dated October 9, 2007 (2007 FC 1036) dismissing the application for judicial review of the decision by the Minister of Indian and Northern Affairs Canada (the Minister) to refuse financial assistance under the Elementary/Secondary Education Program (the Program) to student members of the Micmac Nation of Gespeg (the Band) (see the Minster's letter of refusal dated February 11, 2005, appeal book, volume 2, tab 43, at page 366).

[2] Under the Program, the Minister can contribute to the funding of education services offered in band schools and federal schools for students listed on the Nominal Roll, that is, those who are ordinarily resident on a reserve. The term "reserve" includes all land set aside by the federal government for use and occupation by an Indian band, together with all other Crown lands recognized by Indian and Northern Affairs Canada (the Department) as settlement lands of the Indian band with whom the student resides.

[3] In the case at bar, the Band, whose members live mainly in the Gaspé region and surrounding areas and in Montréal, has no reserve. Therefore, the Band students in the eligible age group for the Program are excluded because they do not meet the residence criterion.

[4] The appellants are the Conseil de la Nation Micmac de Gespeg and Linda Jean, in her own name and as Chief of the Micmac Nation of Gespeg, a position she held at the time of the litigation before the Federal Court. They are seeking to have the Minister's decision set aside and to have it declared that the criterion of residence on a reserve is of no force or effect for bands without a land base because it interferes with their equality rights as guaranteed by section 15 of the *Canadian*

Charter of Rights and Freedoms, Part 1 of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 (the *Charter*).

[5] Section 15 of the *Charter* reads as follows:

Canadian Charter of Rights and Freedoms (R.S., 1982, c. C-00)	*Charte canadienne des droits et libertés* (L.R., 1982, ch. C-00)
15. (1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.	15. (1) La loi ne fait acception de personne et s'applique également à tous, et tous ont droit à la même protection et au même bénéfice de la loi, indépendamment de toute discrimination, notamment des discriminations fondées sur la race, l'origine nationale ou ethnique, la couleur, la religion, le sexe, l'âge ou les déficiences mentales ou physiques.
(2) Subsection (1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.	(2) Le paragraphe (1) n'a pas pour effet d'interdire les lois, programmes ou activités destinés à améliorer la situation d'individus ou de groupes défavorisés, notamment du fait de leur race, de leur origine nationale ou ethnique, de leur couleur, de leur religion, de leur sexe, de leur âge ou de leurs déficiences mentales ou physiques.

[6] Before setting out the analysis of the trial judge and the parties' arguments, it is important to note that the order under appeal was made before the Supreme Court of Canada delivered its judgment in *R v. Kapp*, 2008 SCC 41, [2008] 2 S.C.R. 483 [*Kapp*].

[7] Although this does not mean that the judge's approach should be set aside, the parties and the intervener have insisted on presenting their arguments before this Court in light of that case.

[8] *Kapp* reminded us that the central purpose of combatting discrimination underlies both subsection 15(1) and subsection 15(2) (*Kapp*, above, at paragraph 25). However, going a step further, *Kapp* taught us that subsection 15(2) may be more than an interpretive aid or an exemption to the applicability of section 15 (*Lovelace v. Ontario*, 2000 SCC 37, [2000] 1 S.C.R. 950, at paragraph 97) [*Lovelace*]. According to *Kapp*, a third possibility is that it has an independent role in that it tells us, "in simple clear language, that subsection 15(1) cannot be read in a way that finds an ameliorative program aimed at combatting disadvantage to be discriminatory and in breach of subsection 15" (*Kapp*, at paragraph 38). Therefore, if the government can demonstrate that (1) the Program has an ameliorative purpose and (2) the Program targets a disadvantaged group identified by the enumerated or analogous grounds, it may be unnecessary to conduct a subsection 15(1) analysis at all (*ibid*, at paragraphs 41 and 37).

[9] There was considerable debate before this Court as to whether the guidance of *Kapp*, a case of reverse discrimination, could be applied in a case of discrimination owing to the overly restrictive scope of a program. In that regard, two observations must be made: (1) if *Kapp* had been intended to be read in a limited manner, the Supreme Court of Canada would have stated so; and (2) *Kapp* is part of the line of cases of *Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 143 [*Andrews*] and *Law v. Canada (Minister of Employment and Immigration)*, [1999] 1 S.C.R. 497 [*Law*], neither of which dealt with a case of reverse discrimination. Therefore, I do not believe that the teachings of *Kapp* should be rejected outright for the purposes of this appeal. However, I note that in that case, the third possibility was stated after the Court concluded that "the appellants [had] established that they [had been] treated differently based on an enumerated ground, race" (*Kapp*,

above, at paragraph 29). Since I do not intend to draw a conclusion related to an analogous ground, my analysis will proceed along the path laid out by the trial judge.

Order of the Federal Court

[10] After having set out the facts, which are not in dispute, the trial judge first found that the appellants had "no doubt . . . an interest in disputing the legality of the ministerial refusal" (reasons for order, at paragraph 5).

[11] The trial judge then expanded on the arguments related to discrimination.

[12] Although he found that the Program "draws a formal distinction between residents and non-residents of a reserve" (*ibid.*), he did not find it necessary to determine whether this difference in treatment was founded on an analogous ground (place of residence or lack of land base), considering his conclusion that "even if these grounds exist, there is no discrimination under the circumstances" (*ibid.*).

[13] The judge made a point of clarifying that he had analyzed the evidence from the standpoint of the legality of the Minister's refusal to grant financial assistance under the Program, and not of an application resulting from the Crown's failure to create a reserve for the benefit of the Band.

[14] As a result, he examined the argument of discrimination against the student members of the Band for whom financial assistance had been claimed by noting that it was important to know

whether the lack of financial assistance promoted "the view that students who do not live on reserves or Crown lands are less capable as human beings or as members of Canadian society" (*ibid*., at paragraph 13).

[15] That being said, the trial judge found that there was ". . . no relationship between the ground of distinction used in the Program (here, living on a reserve) on the one hand, and the actual needs, capacities and circumstances of the students of an Indian band who do not live on a reserve or Crown lands, on the other hand" (*ibid*.).

[16] Having also accepted the evidence that the secondary school enrolment rate for First Nations members who live on reserves is lower than the national average, the trial judge determined that intended effect of the Program is to reduce this gap in enrolment and enable them to benefit from programs and services comparable to others available to other students in the same province or territory of residence (*ibid*., at paragraph 14).

[17] In short, the trial judge found that the distinction based on residence to be reasonable: he saw the correlation between the Program and the distinct disadvantage of the target group. He accepted the ameliorative purpose of the Program. Accordingly, he dismissed the application for judicial review, which brings us to this appeal.

Arguments of the parties

[18] Before both courts, the appellants submitted that they met the conditions for applying section 15 of the Charter: the Program establishes a formal distinction owing to the place of residence on a reserve, a distinction that causes them to be subjected to discrimination based on an analogous ground.

[19] I note immediately that the appellants have adopted various positions regarding the choice of the analogous ground, with the result, independent of *Kapp*, that the appellants' arguments are not precisely the same as those which were before the trial judge.

[20] Before the Federal Court, the appellants raised a combination of grounds: Aboriginality-place of residence (applicants' memorandum of fact and law, appeal book, volume 7, page 1689, at paragraph 89) and the characteristic of being or belonging to a landless band (*ibid*., page 1692, at paragraph 105).

[21] In their notice of constitutional question dated February 15, 2007, the applicants worded their analogous ground differently, referring to [TRANSLATION] "Aboriginality-place of residence of landless bands" (appeal book, volume 1, page 37, at paragraph 11(b)).

[22] Finally, in their memorandum before this Court, the appellants once again amended their position by pleading that the alleged discrimination is based on the [TRANSLATION] "characteristic of being a landless band" (appellants' memorandum of fact and law, at paragraphs 6 and 65

[appellants' memorandum], an analogous ground not yet recognized under subsection 15(1) of the Charter).

[23] The appellants criticize the trial judge for [TRANSLATION] ". . . his failure to first establish the analogous grounds giving rise to the difference in treatment, [which meant that he was unable] to correctly establish the nature of this difference in treatment in comparison with another relevant group" (appellants' memorandum, at paragraph 71).

[24] They also criticized the trial judge for having made no ruling on the relevant group or groups for comparison. I will return to this later.

[25] Finally, the appellants dispute the conclusions that the judge drew from his contextual analysis of the discrimination. They submit that the Program fails to take into account the disadvantaged situation in which members of a landless band already find themselves (appellants' memorandum, at paragraph 66). Furthermore, the Program is not a targeted program that is ameliorative within the meaning of subsection 15(2) of the Charter and at best, if it were, it would be overly limiting since it completely ignores a particular group, thereby reinforcing the stereotype that members of landless bands [TRANSLATION] "are less deserving of having access to federal programs and less worthy of being valued as Indians" (*ibid.*, at paragraph 116). As redress, the applicants request that for landless bands, the *criterion of living on the band's traditional territory* be substituted for the one used under the Program, namely the criterion of being ordinarily resident on a reserve.

[26] The respondents defend the order under appeal and present their arguments in succession, setting out an alternate argument for each in the event that it does not succeed. Thus, they argue first of all that the appellants do not have the interest required to raise their constitutional argument. Then, using the analytical method from *Kapp*, they turn immediately to subsection 15(2) and submit that the Program does not establish a distinction based on one of the enumerated or analogous grounds. They add that even if that were the case, the Program is ameliorative within the meaning of subsection 15(2).

[27] In any event, the respondents state that if they are wrong in that respect, the Program is not discriminatory within the meaning of subsection 15(1) of the Charter. And if they are in error and the Program is discriminatory, that infringement would be justified under section 1 of the Charter.

[28] The Women's Legal Education and Action Fund (the Fund) appears as intervener in the case at bar. Without expressing any view on the conclusions sought by the appellants, the Fund also argues that the Program is overly limiting, concluding that it does not fall within subsection 15(2). According to the Fund, the Program must therefore be subjected to an in-depth examination to determine whether it has a discriminating effect (memorandum of fact and law of the Fund, at paragraph 3) [memorandum of the Fund].

[29] More specifically, the Fund suggests that we conduct the systemic and contextual substantive discrimination analysis demanded by *Andrews* and consider the following questions:

a. What is the effect of the exclusion of the appellants as a landless band?

b. Does the Program take into account the particular circumstances of landless bands and their needs in relation to educational services?

c. Is this a discriminatory failure by the Crown to fully exercise its jurisdiction under subsection 91(24)?

d. Is the exclusion a perpetuation of the power imbalance between the Crown and the claimant Aboriginal nation?

e. Is, or in what was is, the exclusion related to the historic, social, economic and other context of the appellants? (memorandum of the Fund, at paragraph 42)

[30] According to the Fund, all of the above questions address the central issue to be determined in this case, which is whether the impugned distinction furthers or exacerbates the oppression, exclusion, marginalization, prejudice or disadvantage of the Micmac of Gespeg, viewed within the context of the existing disadvantage, marginalization or exclusion suffered by them in comparison to bands living on reserve or Crown lands (*ibid.*, at paragraph 43).

Issues

[31] The parties frame the issues similarly, as follows:

- did the judge err in dismissing the appellants' application?
- what is the standard of review in this case?
- do the appellants have the required interest to dispute the Minister's decision?

- does the Minister's refusal based on the Program's eligibility criteria infringe upon the equality rights guaranteed by section 15 of the Charter?
- if there is infringement, what is the appropriate remedy?

Standard of review on appeal

[32] The appropriate standard of review to apply to the order under review is determined according to the nature of the issues.

[33] The errors alleged by the appellants and pertaining to questions of mixed fact and law decided by the trial judge will be reviewed on the standard of palpable and overriding error (*Dr. Q v. College of Physicians and Surgeons of British Columbia*, 2003 SCC 19, [2003] 1 S.C.R. 226; *Ardoch Algonquin First Nation v. Canada (Attorney General)*, 2003 FCA 473, [2004] 2 F.C.R. 108 [*Ardoch*]). As they should be, the pure questions of law will be analyzed according to the correctness standard. Through this approach, the impact of *Kapp* on this dispute will be taken into consideration if applicable.

Analysis

Introduction

[34] This appeal raises many questions that the trial judge addressed when he did not have the advantage of referring to *Kapp*, which the respondents invite us to consider. In this case, the trial

judge used the contextual analysis of discrimination based on subsection 15(1) as a test for the Program, which he deemed to be a targeted ameliorative program.

[35] Even if the trial judge had had the benefit of *Kapp*, he could very well have concluded that the subsection 15(1) analysis was still required.

[36] Consequently and as previously mentioned, regarding the alleged discrimination, I intend to analyze the order under appeal on the basis of subsection 15(1) of the Charter.

[37] I am of the opinion that the exclusion of students not resident on reserve, within the meaning of the Program, does not violate subsection 15(1). I am also of the opinion that the Program's purpose is compatible with subsection 15(1) and that this purpose is not compromised because the Program targets students resident on reserve. I will now go on to analyze the issues.

(1) Interest of the applicants

[38] At paragraph 23 of *Ardoch*, this Court ruled that "the [Charter's] section 15 guarantee of equality only extends to individuals" (see also *Nechako Lakes School District No. 91 v. Lake Babine Indian Band*, [2002] B.C.J. No. 37, 97 B.C.L.R. (3d) 364 (S.C.); *Samson Indian Band and Nation v. Canada*, 2005 FC 1622, at paragraph 779; *Ermineskin Indian Band and Nation v. Canada*, 2005 FC 1623, at paragraph 321; see also *Borowski v. Canada (Attorney General) (Sask. C.A.)*, (1987) 39 D.L.R. (4th) 731, appeal dismissed for other reasons in [1989] 1 S.C.R. 342; *Edmonton Journal v. Alberta (Attorney General)*, [1989] 2 S.C.R. 1326).

[39] Relying on those decisions, the respondents criticize the trial judge for having written that the appellants had "no doubt . . . an interest in disputing the legality of the ministerial refusal" (reasons for order, at paragraph 5). Therefore, they raise the appellants' lack of interest as their first argument.

[40] It is true that the ultimate recipients of the Program are the students living on reserve who also meet the other eligibility conditions for the benefits granted under the Program and that those students, themselves, are not parties to the dispute.

[41] However, it is clear from the National Program Guidelines [Guidelines] in effect at the time of the Minister's decision under review that the first-line recipients of the Program and partners of the Department are the Councils or organizations designated by them, to whom "[c]ontributions for the [Program] may be flowed" (Guidelines, appeal book, volume 8, section 3, at page 1810).

[42] According to the Guidelines, the expression "Councils" includes "bands/settlements, tribal councils, education organizations, political/treaty organizations, public or private organizations engaged by or on behalf of Indian bands to provide education services, provincial ministries of education, provincial school boards/districts or private education institutions" (*ibid.*).

[43] This definition precedes section 5 of the Program, which describes the recipient's rights and obligations following the delegation of responsibilities related to service delivery. It reads as follows:

> Where the recipient delegates authority or transfers program funding to an agency (e.g., an authority, board, committee or other entity authorized to act on behalf of the recipient), the recipient shall remain liable to the Minister for the performance of all of its obligations under the funding agreement. Neither the objective of the program nor the expectation of transparent, fair and equitable service shall be compromised by this delegation or transfer of funds. Where the recipient transfers program funding for instructional services, the terms and conditions of the funding transfer to a third party (e.g., a local provincial school board) must include a provision for INAC to access school records, as required for verification of the Nominal Roll as per these Program Guidelines. [Emphasis added.]

[44] Moreover, that is the context in which the trial judge seems to have addressed the issue of interest while discussing the evidence to the effect that the Minister had continued to provide the Band with decreasing financial assistance until 2004. Furthermore, the trial judge concluded that "the [appellants] no longer have any legitimate expectation of continuing to receive [Department] funds to financially assist Band children who are enrolled in an elementary or secondary school" (reasons for order, at paragraph 6).

[45] I draw this inference because the issue of interest, as presented before our Court, was not raised by the Minister in his memorandum of fact and law before the Federal Court (see appeal book, volume 10, at page 2527 under Issues).

[46] Therefore, and although the respondents did not argue this issue orally, the arguments that they raised in their memorandum have failed to satisfy me that the trial judge erred in concluding as he did. I will therefore address the appellants' allegation of discrimination.

(2) Section 15 of the Charter

[47] An allegation of discrimination based on subsection 15(1) of the Charter consists of three key elements: differential treatment, an enumerated or analogous ground and discrimination in the substantive sense, involving factors such as prejudice, stereotyping and disadvantage (*Law*).

[48] In terms of differential treatment, no one is contesting the trial judge's conclusion that the Program draws a formal distinction between residents and non-residents of a reserve (reasons for order, at paragraph 11). Rather, the appellants are concerned with the matter of analogous grounds.

[49] In *Corbiere v. Canada (Minister of Indian and Northern Affairs)*, [1999] 2 S.C.R. 203 [*Corbiere*], at paragraph 13, Justices McLachlan and Bastarche, writing for the majority, specified how analogous grounds can be recognized:

> 13. What then are the criteria by which we identify a ground of distinction as analogous? The obvious answer is that we look for grounds of distinction that are analogous or like the grounds enumerated in s. 15 — race, national or ethnic origin, colour, religion, sex, age, or mental or physical disability. It seems to us that what these grounds have in common is the fact that they often serve as the basis for stereotypical decisions made not on the basis of merit but on the basis of a personal characteristic that is immutable or changeable only at unacceptable cost to personal identity. This suggests that the thrust of identification of analogous grounds at the second stage of the *Law* analysis is to reveal grounds based on characteristics that we cannot change or that the government has no legitimate interest in expecting us to change to receive equal treatment under the law. To put it another way, s. 15 targets the denial of equal treatment on grounds that are actually immutable, like race, or constructively immutable, like religion. Other factors identified in the cases as associated with the enumerated and analogous grounds, like the fact that the decision adversely impacts on a discrete and insular minority or a group that has been historically discriminated against, may be seen to flow from the central concept of immutable or constructively immutable personal characteristics, which too often have served as illegitimate and demeaning proxies for merit-based decision making.

[50] Although these are not the only criteria that may establish an analogous ground, others being necessary in certain cases, these are the ones that were argued by the parties and discussed by the trial judge at paragraph 9 of his reasons, notwithstanding the fact that he chose not to make a definitive ruling on the question.

[51] Therefore, referring to *Corbiere*, the trial judge wrote:

> 9. At this point, I note that in *Corbiere*, above, the Supreme Court recognized that members of First Nations bands living off-reserve are vulnerable to unfair treatment because a stereotype has been attached to this group that its members are "less Aboriginal" than band members who live on reserves. Based on the evidence in the record, it is clear that a landless band suffers real disadvantages considering the position that the group and its members occupy in the social, political and legal contexts of our society. For an Indian band and its members, the absence of any land base makes them vulnerable to cultural assimilation and impairs the ability of the members to gather together and to preserve connections to the community and to traditional lands where parents, grandparents, great-grandparents and Aboriginal ancestors previously lived. In this case, the fact of being a member of a landless band, which includes Band students for purposes of examining the legality of the Program's impugned provisions, is a personal characteristic. It is immutable or difficult to change. Indeed, the Crown does not seem disposed for the moment to create a reserve or to set aside lands for the Band even though INAC's [the Department's] relationship with the Micmacs of Gespeg can be traced back to 1880.

[52] The trial judge then went on to review the four contextual factors providing "the basis for organizing the third stage of the discrimination analysis" (*ibid*., at paragraph 12). He stated that he followed the approach adopted by the Supreme Court in *Lovelace*, which, with respect, he only did in part. I would not have discussed the divergences in his approach but for the ensuing arguments by the appellants.

[53] Indeed, Justice Iacobucci in *Lovelace*, after having settled on the relevant comparison group, asked whether the complainants had been subjected to differential treatment and whether that

treatment was based on an enumerated or analogous ground. In so doing, he refrained from doing anything more than discuss the arguments of the parties. He then stated that although there may be valid reasons for accepting those arguments on the issue of enumerated or analogous grounds, it was not necessary for him to decide that point because there had not been any discrimination in that case. After reaching that conclusion, Justice Iacobucci performed a contextual analysis of the discrimination by examining the four factors the trial judge referred to in his analysis, namely,

> (i) pre-existing disadvantage, stereotyping, prejudice, or vulnerability, (ii) the correspondence, or lack thereof, between the ground(s) on which the claim is based and the actual need, capacity, or circumstances of the claimant or others, (iii) the ameliorative purpose or effects of the impugned law, program or activity upon a more disadvantaged person or group in society, and (iv) the nature and scope of the interest affected by the impugned government activity. [*ibid*., at paragraph 68]

[54] I note two differences between the *Lovelace* approach and that of the trial judge. The first pertains to how the trial judge dealt with the question of analogous grounds and the second pertains to the choice of the relevant comparison group or groups.

[55] In this case, as the appellants noted at paragraphs 69 and following of their memorandum, the trial judge dealt with the fact of being a landless band as a personal characteristic that is immutable or can only be changed at an unacceptable cost. As well, "[b]ased on the evidence in the record", although the trial judge did not describe it, he found that a "landless band suffers real disadvantages" (reasons for order, at paragraph 9). He therefore made findings of fact compatible with the criteria stated in *Corbiere* and, after reading paragraph 9 of his reasons, it might have seemed that he was preparing to state that the appellants had demonstrated differential treatment based on an analogous ground. In that sense, I believe that the trial judge went much further than did Justice Iacobucci in *Lovelace*. It seems that the result was a false expectation on the part of the

appellants, who appeared before us in the hope that this Court would take the one step missing, in their opinion, and recognize [TRANSLATION] “the characteristic of being or belonging to a landless band” as a new analogous ground.

[56] Nevertheless, these statements by the trial judge are not, in and of themselves, a valid ground for appeal.

[57] The appellants also submit that at the discrimination analysis stage, the trial judge did not clearly identify the relevant comparison group or groups, suggesting [TRANSLATION] “not less than three different possible comparisons”, namely, (1) the members of a landless band, including Band students (reasons for order, at paragraphs 8 and 9); (2) Indians who are residents and non-residents of a reserve (*ibid*., at paragraph 11); and (3) students, band members or not, who do not live on a reserve or Crown lands (*ibid*., see also paragraph 80 of the appellants’ memorandum).

[58] According to the appellants, the characteristic of the Band that is relevant to the benefit sought is that of being landless. Consequently, the comparison that is useful to make is the comparison between a landless band and a band having a land base. It is not appropriate to compare the Band with a group of members of other bands resident off reserve since that comparison is between two groups who are ineligible for the Program, which prevents any difference in treatment from being identified (*ibid*., at paragraphs 91 and following).

[59] The appellants are therefore asking the Court to rule on the analogous ground that they have chosen and to identify the group they propose as the relevant comparison group.

[60] For the reasons that follow, I do not agree with either one of those submissions.

[61] I am not satisfied that the trial judge erred in law or made any other decisive error in ruling as he did on the application. He applied the subsection 15(1) substantive equality framework of the Charter and decided the dispute in accordance with the third step in the analysis of discrimination without ruling on the analogous grounds.

(a) Analogous ground

[62] There was no need for the trial judge to make any findings of fact in relation to the analogous grounds, and it probably would have been preferable had he not done so. However, the fact that he did does not constitute a ground to set aside his order.

[63] Moreover, I am of the opinion that in the case at bar, this Court should not engage in that exercise. The limited scope of the appeal book does not allow for the rigorous analysis that must precede the recognition of a new analogous ground.

[64] Since *Andrews*, above, it has been acknowledged that an allegation of discrimination may be founded, either on one of the nine grounds enumerated at subsection 15(1) or on a ground of discrimination analogous thereto.

[65] To date, few analogous grounds have been established by the Supreme Court of Canada. They are sexual orientation (*Egan v. Canada*, [1995] 2 S.C.R. 513; *Vriend v. Alberta*, [1998] 1 S.C.R. 493; *M. v. H.*, [1999] 2 S.C.R. 3; *Little Sisters Book and Art Emporium v. Canada (Minister of Justice)*, [2000] 2 S.C.R. 1120); marital status (*Miron v. Trudel*, [1995] 2 S.C.R. 418; *Nova Scotia (Attorney General) v. Walsh*, [2002] 4 S.C.R. 325); citizenship (*Lavoie v. Canada*, [2002] 1 S.C.R. 769; (*Andrews*); and Aboriginality-residence (*Corbiere*).

[66] In comparison, the following proposed analogous grounds were rejected: marijuana use (*R. v. Malmo-Levine; R. v. Caine*, [2003] 3 S.C.R. 571); professional status (*Reference Re Workers' Compensation Act, 1983 (Nfld.) [Piercey Estate v. General Bakeries Ltd.]*, [1989] 1 S.C.R. 922; *Delisle v. Canada (Deputy Attorney General)*, [1999] 2 S.C.R. 989; *Baier v. Alberta*, 2007 SCC 31, [2007] 2 S.C.R. 673 [*Baier*]); actions against the Crown (*Rudolph Wolff & Co. v. Canada*, [1990] 1 S.C.R. 695); province of residence (*R. v. Turpin*, [1989] 1 S.C.R. 1296); members of the Armed Forces (*R. v. Généreux*, [1992] 1 S.C.R. 259); new residents of a province (*Haig v. Canada; Haig v. Canada (Chief Electoral Officer)*, [1993] 2 S.C.R. 995); persons who commit a war crime or a crime against humanity abroad (*R. v. Finta*, [1994] 1 S.C.R. 701 [*Finta*]).

[67] The small number of analogous grounds recognized over the years is, I believe, indicative of a firm intention of the Supreme Court and of the other courts of law in Canada not to trivialize subsection 15(1) of the Charter by allowing a plaintiff to embark on a desperate search for an analogous ground to support his or her arguments, which, it seems to me, the appellants have done throughout their legal proceedings.

[68] The evidence of a plaintiff who is relying on an unrecognized analogous ground is assessed not only in the context of the impugned law or program, but also "in the context of the place of the group in the entire social, political and legal fabric of our society" (*Andrews*, at paragraph 5). In this case, the group is understood to consist of the bands without a land base, not only the appellant Band (*Finta*, at paragraph 336; *Corbiere*, at paragraphs 7 and 8; *Baier*, at paragraph 65).

[69] At the hearing of this appeal, the appellants failed to demonstrate to me the sufficiency of the evidence in the record, within the meaning of *Finta*, *Corbiere* and *Baier*, to recognize the [TRANSLATION] "characteristic of being a landless band" as a new analogous ground.

[70] I therefore conclude that the trial judge did not err in not deciding the issue of analogous grounds. Had I decided to the contrary, I would have referred the case back to the trial judge since he would be best placed to decide it, owing to his extensive exposure to the evidence, the advantage of hearing the parties' arguments and his familiarity with the case as a whole (*Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235, at paragraph 18).

[71] I will now turn to the trial judge's analysis of discrimination found at paragraphs 12 and following of his reasons. I will begin with the appellants' criticism of the order under appeal with regard to the selection of a relevant comparison group. In my opinion, the appellants' criticisms are unjustified.

(b) Relevant comparison group

[72] It is true that the trial judge's conclusion was not as precise as the one made in *Lovelace*. However, the debate, as conducted, results in confusion as to its true nature. The judge noted this at paragraph 13 of his reasons by clarifying, as I stated earlier, that he had before him an application for review of the Minister's refusal to grant funds under the Program, and not of the Minister's refusal to create a reserve for the benefit of the Band. Therefore, quite rightly, the trial judge turned his attention to the student recipients of the Program. He thus established a correspondence between those students and the "students of an Indian band who do not live on a reserve or Crown lands" (*ibid*.). The appellants have failed to satisfy me that the trial judge erred in choosing that comparison group. Moreover, they had asked him to do so at paragraph 86 of their memorandum of fact and law filed with the Federal Court:

> [TRANSLATION]
> 86 When a given group is expressly excluded from a program that makes benefits available to others, the eligible persons are the appropriate comparison group: *Nova Scotia (Workers' Compensation Board) v. Martin*, [2003] 2 S.C.R. 504, at para. 71.

[73] The judge then elaborated on each of the abovementioned factors from the third stage of the contextual analysis of discrimination under 15(1).

(c) Contextual analysis under 15(1)

[74] Regarding the first and second factors, the following finding by the trial judge is fatal to the appellants:

> It is not sufficient for a claimant simply to assert, without more, that his or her dignity or someone else's has been demeaned (*ibid*.).

[75] As for the third factor, the Program's ameliorative effect, the judge made a finding of fact supported by the evidence and stated that it was "one of the targeted federal ameliorative programs designed to address the unique challenges faced by First Nations members living on reserves or Crown lands" (*ibid*., at paragraph 14).

[76] The fact that the Program has more than one purpose or seeks to attain more than one objective is not a bar to this finding. As Justice Iacobucci wrote in *Lovelace* at paragraph 85, "the focus of analysis is not the fact that the appellant[s] . . . are equally disadvantaged, but that the program in question was targeted at ameliorating the conditions of a specific disadvantaged group rather than a disadvantage potentially experienced by any member of society."

[77] Last, the trial judge reviewed the nature of the affected right and stated the following:

> . . . in the past, [the Minister]'s financial assistance for band students focused more specifically on defraying the costs of school supplies and clothes, as well as school bus transportation at noon. The latter two expenses are not eligible under the Program. I am, of course, aware of the fact that for approximately 30 years, a number of Aboriginal families not living on reserves or Crown lands received financial assistance from [the Minister]. However, the Program in its current form is not a social assistance program. Currently, band students attend provincial elementary and secondary schools in their respective municipality of residence where they have access to a whole range of provincial programs and services. On the other hand, there is nothing in the evidence to indicate that the academic performance of the band students is comparable to those of students currently living on reserves or Crown lands. The latter do not necessarily have access to the same range of provincial services, hence the Program's raison d'être (reasons for order, at paragraph 15).

[78] Once again, the appellants have failed to satisfy me that there is any justification for this Court to intervene on the findings of fact.

[79] Lastly, the respondents had proposed that this Court deal with this case in light of *Kapp*, but given the above reasons, there is no need for me to adopt that approach or to address the other issues raised in this appeal.

Conclusion

[80] Accordingly, I would dismiss the appeal with costs.

"Johanne Trudel"
J.A.

"I agree.
Marc Noël J.A."

"I agree.
J.D. Denis Pelletier J.A."

Certified true translation
Sarah Burns

FEDERAL COURT OF APPEAL
NAMES OF COUNSEL AND SOLICITORS OF RECORD

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